Real Property — Rights of a Grantee from An Improving Grantor in Partition

Plaintiff, the grantee of an improving contenant, claims that a lien on the land for improvements passes to her through the deed as against the trustee in bankruptcy for the other cotenant. Held; the deed does not pass to the grantee any lien or equitable claim against the common property, or on the proceeds of the sale of the estate partitioned, for the improvements made by the grantor.[1]

In order for the grantee to recover in this action she would have to show that the grantor had a lien or an equitable charge on the premises for improvements made, and this passed with the deed.[2] As a general proposition a tenant-in-common has the right to improve the property, but does not have the right to compel contribution from his cotenants unless they have assented to these improvements.[3] But the improving tenant-in-common may bring partition proceedings,[4] and the amount and manner of recovery are in the discretion of the court. At common law, the improving cotenant had no means of recovery other than in equity for partition, and could not sue his cotenant at law for improvements or repairs made.

There are four usual approaches in partition proceedings to protect the improving party; first, if it is possible, the court will allot the improved portion of the property to the improving cotenant;[5] second, an assignment to the improving cotenant of increased proportion of the land to cover the amount of the share of the other cotenant, had he contributed;[6] third, when partition can not be had satisfactorily and a sale is necessary, the improving cotenant will be reimbursed from the proceeds of the sale; and his reimbursement will be gauged not by his cost, but by the amount which the improvement enhances the value at the sale;[7]

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[1] *Russell* v. *Russell*, 63 Ohio App. 33 (1939).

[2] A grantee of a cotenant has no better right against other contenants than had his grantor. *Gill* v. *O'Neil*, 225 Ala. 92, 142 So. 397, 85 A.L.R. 1526 (1932).

[3] "Where one of several cotenants made improvements on the common property without the consent of the others neither the property nor his cotenants are chargeable as a matter of right with their value, or the expenses incurred in making them." 7 R.C.L. 833, "Cotenancy" section 33. Also see 62 C.J. 401, at 481, section 122, 123. Also see 14 American Jurisprudence 115, "Cotenancy" section 49.

[4] Right of a tenant in common to compensation for improvements made on the joint property is not absolute and will be decreed only where circumstances make it equitable to do so in light of interests of other tenants. *Summers* v. *Satterfield*, 196 S.E. 159, 122 A.L.R. 229 (1938).

[5] *Roberts* v. *Roberts*, 278 S.W. 937 (Texas Civ. App., 1925).

[6] *Adjustment on Partition of Improvements Made by Tenant in Common*, 1 A.L.R. 1189, at 1202.

[7] *Ward* v. *Ward Heirs*, 40 W.Va. 611, 21 S.E. 746, 29 L.R.A. 499, 52 Am. St. Rep. 911 (1895). *Kessler* v. *Smith*, (New Jersey) 128 Atl. 598 (1924).

fourth, compensation by the cotenant who receives the improved property as a result of the partition proceedings.[8]

It has been said that the improving cotenant does not have anything comparable to a lien[9] on the property for the improvements, but merely an equitable claim which will be adjusted as well as possible by the court in partition proceedings. In the principal case, the grantor had no lien and so none could pass to his grantee, by reason of the deed. From the court's approach, the improving grantor may have had an equitable claim which he himself could have enforced in partition proceedings but this did not pass to his grantee. The court holds that this equitable claim could have passed to the grantee but the deed must state in express terms that the improvements are included in the estate conveyed. However, it is submitted that the grantee should be in as good a position as the improving grantor, that is, he should have an equitable claim to be adjusted in partition proceedings in one of the above mentioned ways, unless there is something in the transaction which negatives the transfer of the improving tenant's equity. Whether or not this claim did pass should be resolved ultimately by the intentions of the parties to the transaction, and not by the court determining if the deed purported in terms to convey the improvements.

It is interesting to note the disposition made by the court of the inchoate right of dower of the wife of the bankrupt. The court cites 30 Ohio Jurisprudence, 931, sec. 114 for the proposition that in a partition action, an inchoate right of dower in an undivided interest is replaced by a right of dower in the proceeds as against the creditors of the consort; or as against trustee for such creditors. This permits a partition action or a sale of the premises without the consent of the spouse. It would seem that this is a proper disposition of the dower interest, but the Ohio Supreme Court has held that in partition proceedings the wife's dower

[8] "Where it appears that an allotment of the improved portion to the improving tenant in partition in kind is not equitable or practicable, the improving tenant should be allowed reasonable compensation from those who receive the benefits." *Adjustment on Partition of Improvements Made by Tenant in Common*, 122 A.L.R. 234. Also see *Clarke* v. *Clarke*, 183 N.E. 13, 349 Ill. 642 (1932).

[9] But note, a tenant in common, placing improvements on the common property with the express assent of his cotenant, acquires a lien on his cotenant's interest for a proportionate share of the cost of improvements. *Baird* v. *Jackson*, 98 Ill. 78 (1881); also see *Houston* v. *McClurcy*, 8 W.Va. 135 (1874).

A cotenant has been held to have a lien on the premises when she paid off a mortgage on the common property in order to save her estate. And this lien may be enforced in an action for an accounting, or as an allowance upon partition, or by separate actions for contribution. *Weisner* v. *Wilson*, 197 N.W. 608, 228 Wis. 501 (1938).

Also a tenant in common who pays the entire amount of taxes due on the common property has a right of contribution from the cotenant in proportion to their share of the estate.

interest in divested and she has apparently no right in the proceeds as against her husband.[10] J. W. L.

The Nature of Restrictive Covenants — Enforcement by Covenantee Who No Longer Owns Land in the Community

A recent Ohio decision[1] involves the nature of restrictive covenants and the theories of their enforcement. A corner lot which had been part of a testamentary estate was transferred by a deed containing a restrictive clause forbidding the use of the premises for other than residence purposes. The restriction was stated to be for the benefit of certain named devisees and also to and for the benefit of the present and future owners of the real estate which the testator had owned on a particular street. An owner of property on the adjoining street joined with one of the named covenantees in seeking to enforce the covenant by injunction against a successor in title to the lot in question. Enforcement was denied on the grounds that no one on the designated street was objecting and that the covenantee who no longer owned land in the community would not "benefit" from enforcement of the restriction.

The character of the remedy sought indicates that the theory of the plaintiff's case was based on equity doctrines. A substantial reason for appealing to equitable jurisdiction is the specific nature of the remedy which equity affords. More often than not the party seeking to enforce a restrictive covenant is more interested in insuring the continuance of the limitation than in obtaining monetary compensation. Such a desire has been especially evident in the field of building restrictions in the development of residential subdivision plans and recourse to equity has been most frequent in this area.

When there is an attempt to enforce covenants by and against successors to the original covenating parties there are further advantages in the equitable approach. Many of the strict and rigid requirements,[2] like the necessity of privity, which were incident to the common law devices of easements and real covenants are relaxed or avoided in equity. The leading case[3] using the equity approach made the equitable doctrine

[10] *Weaver* v. *Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355 (1856). Also see *Long* v. *Long*, 99 Ohio St. 330, 124 N.E. 161, 5 A.L.R. 1343 (1920). Also see Tiffany, Real Property, 2d ed., vol. 1, sec. 230, p. 801.

[1] *Taylor* v. *Summit Post No. 19, American Legion, Inc.*, 60 Ohio App. 201, 27 Ohio L. Abs. 582, 13 Ohio Op. 215, 20 N.E. (2d) 267 (1938).

[2] *Hurd* v. *Curtis*, 19 Pick. (Mass.) 459 (1837); *Burbank* v. *Pillsbury*, 48 N.H. 475, 97 Am. Dec. 633 (1869); *Lingle Water Users' Ass'n* v. *Occidental Bldg and Loan Ass'n*, 43 Wyo. 41, 297 Pac. 385 (1931); note (1937) 4 O.S.L.J. 93; 1 Tiffany, Real Property, (2d Ed., 1920) sec. 54 (d).

[3] *Tulk* v. *Moxhay*, 2 Phil. (Eng. Ch.) 774 (1848).